No. 339

EUGENE KNOEGLER, District Director of Immigration and Naturalization,

Petitioner,

vs.

JOSEPH GEORGE STRICKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

MARTIN DIES,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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BRIEF AMICUS CURIAE, FILED ON BEHALF OF MARTIN DIES, M. C.

I. Preliminary Statement.

This case raises questions with respect to the rights of aliens under the Constitution and Laws of the United States which are of vital interest to our Government and its citizens. My purpose in presenting this brief is:

1. Generally to supplement petitioner's presentation in the respects and to the extent necessary for an adequate coverage of the facts, issues and law in this case; and

2. To call attention to certain omissions and the distorted treatment of certain inclusions in petitioner's appeal; and

3. To indicate certain questions which petitioner seeks to inject into this case that are not properly raised by the Record.

II. Question Presented.

Did the Circuit Court of Appeals err in failing to affirm the judgment of the District Court?[1]

III. Summary of Argument.

1. There was evidence before the Secretary of Labor to support the findings and each of them made in the warrant of deportation of this alien on August 14, 1934 (R. 64-65).

2. The Circuit Court of Appeals erred in its findings that there was no evidence to support the warrant of deportation issued against this alien on August 14, 1934.

3. The Circuit Court of Appeals erred in usurping the functions of the Secretary of Labor in evaluating the evidence which had been received and adjudged by the Secretary of Labor.

4. The Circuit Court of Appeals erred in assuming that the alien joined the Communist Party of America, prior to the 8th of November, 1932, in order to participate in said election, and the Court assumes that he did not join the Communist Party subsequent to November 8, 1932, for the propagation of the Communistic program.

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[1] The questions presented by the petitions for rehearing filed by the United States Attorney in the Circuit Court of Appeals are found in the Record at pages 74-76 and 80-81. The question presented by the Solicitor General in the petition for a writ of certiorari is found on page 2 of said petition. The questions presented in the brief of petitioner are found on pages 2-3 of said brief.

5. The Circuit Court of Appeals erred in its assumption that the statutes involved in this case were enacted to meet a situation growing out of the Russian revolution; and that conditions have so changed in the United States and Russia since then that previous decisions of the courts are no longer authoritative nor is strict enforcement of the statutes imperative.

6. The Circuit Court of Appeals erred in assuming the prerogatives of the Congress of the United States by judicially legislating that conditions in the United States and Russia have so changed since the passage of this Act as to abrogate said Act, and that aliens who were deportable under said Act in the 1920's are not deportable in the 1930's.

7. That counsel for petitioner have erroneously withdrawn from the consideration of this Court (Brief, p. 8) the second and third grounds for deportation, as set out by the Secretary of Labor in her warrant of deportation.

8. That counsel for petitioner have raised questions on behalf of the alien in its brief which are not properly presented by the Record; and have volunteered on behalf of Strecker and other aliens to create constitutional defenses and immunities and to defeat statutory enactments of Congress relating to immigration; and have failed to adequately present to this Court the inherent constitutional right of Congress to protect the United States against the dangers incident to the admission and residence within the United States of undesirable foreigners.

IV. Statement.

From the record filed herein the alien became a member of the Communist Party on November 15, 1932 (R. 11), although he testified on September 16, 1933, that he joined the Communist Party on November 1, 1932, in a negro church at

Little Rock, Arkansas (R. 42), later on January 23, 1934, he testified "I think it was one day before the Presidential election of 1932 (R. 12), (which would have been November 7, 1932). Judge Hutcheson, writing the opinion for the Circuit Court of Appeals, ignores the documentary evidence, showing that the alien was admitted to the Communist Party on November 15, 1932, and states in his opinion as follows:

> "The evidence, and the only evidence relied on for the finding and order, is that *during the Presidential campaign of 1932*, when one Foster was running as the white, and one Ford as the colored candidate of the Communist Party of America, for President of the United States, appellant in November 1932 became a member of the Communist Party and accepted certain literature of the Communist Party for distribution. He testified that he was a member of the Communist Party of America until February, 1933, when he quit paying his dues, and that since that time he has not been a member." (Italics ours.)

The record further shows that the alien paid dues as a Communist through February 1933 (R. 36), and it is therefore assumed by Government counsel that Strecker ceased to be a member of the Communist Party by virtue of the fact that he did not pay any dues after February 1933—an assumption which was also indulged in by Judge Hutcheson. The petitioner, as a result of this false assumption, says in its brief (Note, p. 8):

> "The Government does not rely upon the second and third grounds specified in the warrant. These allege that the respondent 'is' a member of the organizations described (R. 64-65). The Communist Party membership book of the respondent discloses that he joined the party in November 1932, and that he did not pay membership dues after February 1933 (R. 34-36). He testified that he bought only 'a few stamps' to put in the

book (R. 14; see also R. 6). The membership book states that 'Members who are four weeks in arrears in payment of dues cease to be members of the party in good standing,' and that 'Members who are three months in arrears shall be stricken from the rolls' (R. 38): It would, therefore, appear that respondent was stricken from the rolls of the party some time in May 1933. There was no evidence to the contrary. The warrant of arrest was not issued, however, until November 25, 1933 (R. 8), and the warrant of deportation was dated August 14, 1934 (R. 65). In view of the evidence the Government finds no ground for contending that at those times the respondent was a member of the described organizations. Cf. Greco *v.* Haff, 63 F. (2d) 863 (C. C. A. 9th)."

1. The mistake of Government counsel in thus withdrawing two of the four grounds of deportation from the consideration of the Court was probably due to their failure to note that the alien Strecker *filed* his petition for naturalization in the United States District Court at Little Rock, Ark., on March 1, 1933 (R. 39), and that he testified under oath on October 25, 1933, before Immigrant Inspector Carroll D. Paul (R. 30) that his purpose in filing his petition for citizenship in the United States was that he thought he would have more protection from the law if he was a citizen of the United States. When asked "Do you mean that section of the law which provides for the deportation of certain aliens?" he replied "I did not say that," whereupon he was asked "Isn't it a fact that your party leader advised you not to become too active in that you might be subject to deportation from the United States?" to which he replied "Something like that", and then in reply to the question "In the event the Communist Party of America attains sufficient power or proportion to be of service to you, will you pay your back dues and go along with them?" he said "Certainly (R. 34)." He further testified at this hearing that

he had had no change of heart with respect to the Communist Party and still felt toward it as he did at the time of his initiation (R. 32).

From the foregoing the reasonable inference is that the alien ceased paying his dues on March 1, 1933, at the suggestion of his Communist leader, to avoid the danger of deportation.

His *continued membership* in the Communist Party after February, 1933, is further indicated by his purchase of bonds of the Soviet Republic "four months before this country established diplomatic relations with the Soviet Government" (Pet.'s Brief, p. 52). This purchase was made about July 16, 1933 (R. 43), because "It was represented to me that the United States Government's money would soon be worthless, or at best very cheap, and I thought it wise for my own protection to put my money into bonds of the present Russian Soviet Government. These bonds are paying interest in gold dollars American money." Strecker further testified (R. 43):

> "I do not consider myself a Communist, because I am not paying dues to the Communist Party. I do not know whether we shall ever have a Communist system in the United States. I have read Marx's books and Marx states that sooner or later there will be a red revolution in every country in the world. I am trying to protect myself, and that is why I bought the bonds of the Russian Government. I do not know what is going to happen; I do not know how long I am going to live. If I knew when I was going to die, I would get me about four women and have a hell of a time before I die. If Communism comes in this country I will not be against it, because I have to go with the people, and whatever the people want I will have to go along with them."

Surely such evidence was conclusive proof of the first and fourth grounds of deportation and of "affiliation" with

the Communist Party (an averment negligently omitted from the warrant of deportation) and sufficient evidence to warrant the inference of continued membership in said party and to sustain the Secretary of Labor's findings.

The Circuit Court of Appeals further finds:

> "The statute under which these proceedings were instituted was enacted in 1918 and amended in 1920, to meet a situation caused by the crisis in Russia in 1918 and 1919, and the propaganda following that crisis for the overthrow of governments by force. It was enacted to enable the United States to expel from its shores aliens seeking a footing here, to propagandize and proselytize for direct and violent action. The decisions of the Circuit Courts of Appeal in Skeffington *v.* Katzeff, 1 Cir. 277 Fed. 129; Antolish *v.* Paul, 7 Cir. 283 Fed. 957; Ungar *v.* Seaman, 8 Cir. 4 F. (2d) 80, on the authority of which it was held in Ex Parte Vilarino, 9 Cir. 50 F. (2d) 582; Kjar *v.* Doak, 7 Cir. 61 F. (2d) 566, upon which the appellee relies here, that membership in the Communist Party of America alone is sufficient to warrant deportation, were rendered upon the Russian experience, and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute."

Apparently the Court made no historical study of the statutes involved in this case. As early as 1903 (32 Stat. 1214-1221), the Congress of the United States excluded from admission aliens "who believe in or advocate the overthrow by force or violence of the Government of the United States." Certainly there was no Russian revolution at that time.

Again, on February 5, 1917, the Congress passed an Act (39 Stat. 889, c. 29), in part as follows:

> "That * * * any alien who at any time after entry shall be found advocating or teaching the unlaw-

ful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States * * * shall upon the warrant of the Secretary of Labor be taken into custody and deported."

This antedated the organization of the Soviet Republic of Russia. According to "Statesman's Yearbook, 1938" the abdication of the Russian Czar took place on March 15, 1917. It is my opinion that the primary cause for the passage of the Acts of February 5, 1917, and October 16, 1918, was the seditious activity and propaganda of the Industrial Workers of the World in the United States during the World War.

In *Guiney* v. *Bonham*, 261 Fed. 582 (9 C. C. A., decided December 1, 1919), the alien Guiney, a member of the Industrial Workers of the World, was deported under the Act of 1917.

The Circuit Court of Appeals further erred in its failure to grasp an elemental distinction between the rights of aliens and of native-born citizens of the United States. A native-born citizen may have and express beliefs which an alien may neither have when such alien enters the United States, nor acquire after coming here under penalty of deportation.

The Circuit Court of Appeals committed three other errors in its decision:

1. It assumes to weigh the evidence for and against the alien, disregarding that which is unfavorable to the alien upon which the Secretary of Labor hypothecated the warrant of deportation, and accepting as true the testimony which is favorable to the alien; and

2. The Circuit Court of Appeals held that

"The decisions of the Circuit Courts of Appeal * * * upon which the appellee relies here, *that mem-*

bership in the Communist Party of America alone is sufficient to warrant deportation were rendered under the Russian experience and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute." (Italics ours.)

No court ever held "that membership in the Communist Party of America alone is sufficient to warrant deportation." It has always been held by all of the courts that membership or affiliation "with any organization, association, society, or group that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States" constituted grounds for deportation, and that sufficient evidence had been offered in these cases to show that the Communist Party was such an organization.

3. The Circuit Court of Appeals further holds that Congress passed an Act in 1920, which Congress only meant to be enforced at that time, because of the peculiar conditions, but which Congress does not mean should be enforced at this time, because of changed conditions, which the court explains as follows:

> "Much water, socially and politically, has gone under the bridge since 1920. Russia itself is more vigorously organized than almost any other country in the world to prohibit and suppress those who teach and preach the overthrow of government by force."

When conditions have so changed that Congress is disposed to repeal its immigration laws, it has the power to do so, but the Circuit Court of Appeals for the Fifth Circuit has no such power, regardless of its views on "Pecksniffian righteousness" and the "cause of liberalism."

The righteousness or unrighteousness of our immigration laws are not matters of the courts' discretion. It is not for the courts of the United States to decide what aliens may enter the United States, nor what aliens shall be deported from the United States. That is an exclusive prerogative of the Congress of the United States.

Since the decision by Mr. Justice Gray in 1893, in the case of *Fong Yue Ting* v. *U. S.*, 149 U. S. 698, 720, 13 Sup. Ct. 1016, 37 L. Ed. 905, the right of Congress to exclude and deport aliens, even in contravention of treaties, has been settled. In that case this Court said:

> "In the recent case of Ekiu *v.* U. S., 142 U. S. 651, 659, the Court, in sustaining the action of the executive department putting in force an Act of Congress for the exclusion of aliens, said: 'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe' • • •.
>
> "In our jurisdiction, it is well settled that the provisions of an Act of Congress passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty."

Even when the Acts of Congress work a manifest hardship on aliens *who are innocent of any wrongdoing*, still the enactments of Congress and not the judgment of the Court must prevail.

In *Fong Yue Ting* v. *U. S.*, *supra*, the Court says:

> "In the case of Chae Chan Ping *v.* United States, already often referred to, a Chinese laborer, who had resided in San Francisco from 1875 until June 2, 1887, when he left that port for China, having in his posses-

sion a certificate issued to him on that day by the collector of customs, according to the Act of 1884, and in terms entitling him to return to the United States, returned to the same port on October 8, 1888, and was refused by the collector permission to land, because of the provisions of the Act of October 1, 1888, above cited. It was strongly contended in his behalf, that by his residence in the United States for twelve years preceding June 2, 1887, in accordance with the fifth article of the treaty of 1868, he had now a lawful right to be in the United States, and had a vested right to return to the United States, which could not be taken from him by any exercise of mere legislative power by Congress; that he had acquired such a right by contract between him and the United States, by virtue of his acceptance of the offer, contained in the acts of 1882 and 1884, to every Chinese person then here, if he should leave the country, complying with specified conditions, to permit him to return; that, as applied to him, the Act of 1888 was unconstitutional, as being a bill of attainder and an *ex post facto* law; and that the depriving him of his right to return was punishment, which could not be inflicted except by judicial sentence. The contention was thus summed up at the beginning of the opinion: 'The validity of the Act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress.' 130 U. S. 584-589 (32: 1070).

Yet the court unanimously held that the statute of 1888 was constitutional, and that the action of the collector in refusing him permission to land was lawful; * * *."

Counsel for the Government herein have raised several questions which are outside of the record on behalf of this alien and others. On page 20 of their brief they say:

"While respondent did not specifically raise in his petition for habeas corpus (R. 1-2), or in his assign-

ment of errors below (R. 67-69), or in his brief in opposition to certiorari, the question of the constitutional right of freedom of speech and of assembly under the First Amendment of the Federal Constitution, that question may be deemed by the Court to be pertinent with respect to this question of statutory construction. Cf. Herndon *v.* Lowry, 301 U. S. 242. * * *.

"It was pointed out in that case (Herndon *v.* Lowry, *supra*) that 'peaceful agitation for a change of our form of government is within the guaranteed liberty of speech' (p. 259). In that case this Court set aside, on constitutional grounds, a conviction under a criminal insurrectio.. statute of Georgia which made it an offense to advocate violence against the state whether the violence was intended to result immediately or 'at any time within which he (the defendant) might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce' (pp. 254-255). * * *"

As a Friend of the Court, I urge that this issue which the Solicitor General and his associates have thus sought to inject into this case, is a spurious one, and that the authority which they have cited in support thereof, to-wit, *Herndon* v. *Lowry*, 301 U. S. 242, is not applicable for the reason that in the Herndon case the Supreme Court was deciding a question involving the constitutional rights of a native-born citizen and not of an alien. In support of my contention that aliens do not enjoy, and never have enjoyed, equal rights with citizens of the United States under the Constitution and laws of the United States, as interpreted by this Court, your attention is directed to the opinion of Mr. Justice Brandeis in the case of *Ng Fung Ho* v. *White*, 259 U. S. 276:

"As to Gin Sang Get and Gin Sang Mo, a constitutional question also is presented. Each claims to be a foreign-born son of a native-born citizen; and hence, under Section 1993 of the Revised Statutes to be him-

self a citizen of the United States. They insist that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial proceeding. U. S. *v.* Ju Toy, 198 U. S. 253; Tang Tun *v.* Edsell, 223 U. S. 673. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously. * * *. The constitutional question presented as to them is, may a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void *ab initio*. U. S. *v.* Sing Tuck, 194 U. S. 161. * * * To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow *v.* U. S. 208 U. S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivations without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law * * *. It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States, but it does not follow that they should be discharged * * *. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship. As to Ng Fung Ho and Ng Youen Shew the judgment of the Circuit Court of Appeals is affirmed."

In *Herndon* v. *Lowry, supra,* the issue was the constitutionality of a State statute involving the criminal prosecution of a citizen of the United States. This Court has repeatedly held that deportation is a civil and not a criminal

procedure, and therefore that an alien is not entitled to the constitutional safeguards involved in a criminal prosecution.

On page 22 of their brief Government counsel say:

> "It would appear to be settled, therefore, that with respect to aliens while resident here, the power of Congress is subject to the limitations of the Constitution, and that an appropriate basis must be found for subordinating the rights of persons under the First Amendment to the exercise of Congressional control. That justification is ordinarily to be sought in the protection of the Government against the danger of overthrow by force and violence. The Herndon case, *supra*, suggests that the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted.
>
> "The question whether a similar standard is applicable in relation to deportation is one which has not been squarely passed upon by this Court. * * *"

It would appear from the foregoing quotations that counsel for the Government strongly suggest that even an alien may have the right to "peaceful agitation for a change of our form of Government * * * within the guaranteed liberty of speech", and that the "power of Congress is subject to the limitations of the Constitution" with respect to legislative concern "or danger of overthrow by force and violence", and that "the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted."

This Court has repeatedly held that Congress was not restricted in any such manner as suggested by Government counsel. In the case of *Turner* v. *Williams*, 194 U. S. 279, 48 L. Ed. 979, 985, this Court held:

"And if the judgment of the board and the Secretary was that Turner came within the Act as thus construed, we cannot hold as matter of law that there was no evidence on which that conclusion could be rested. Even if Turner, though he did not so state to the board, only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating, not simply for the benefit of workingmen, who are justly entitled to repel the charge of desiring the destruction of law and order, but 'at any rate, as an anarchist', the universal strike to which he referred * * * we cannot say that the inference was unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end.

"If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers, innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few; and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government."

From the foregoing questions which have been raised by Government counsel outside of the record, and were not urged by Strecker's counsel, it appears that the Solicitor General and his associates, and Mr. Reilly, Solicitor of the Department of Labor, are seeking a declaratory judgment in favor of aliens, and an enlargement of their constitutional rights by judicial decree, contrary to the statutes of the United States in such cases made and provided.

This volunteer service by the legal staffs of the Departments of Justice and Labor, on behalf of an alien, such as the record shows Strecker to be, induces a reasonable in-

ference that the ultimate object of this appeal is to elicit a judgment from this Court which will protect other aliens against whom deportation proceedings are now pending.

Although counsel for the Government owe a duty to enforce the laws of the United States, they have chosen rather to suggest to this Court rights which the alien does not urge.

When this Court reads the record it will be found that the alien Strecker is no lily of the valley, nor is he an innocent victim of Government perfidy. On the contrary he has been most gently dealt with and has, through the negligence or liberality of the Government been enabled to protract his deportation for over four years.

WHEREFORE, I respectfully and earnestly pray that this Court terminate the further stay of this undesirable alien within the United States by reversing *in toto* the decision of the Circuit Court of Appeals herein.

MARTIN DIES, M. C.,
Attorney.